

First Supplement to Memorandum 2020-4

Disposition of Estate Without Administration (Comment on Tentative Recommendation)

In Memorandum 2020-4, the Commission¹ discussed a letter it had received from the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (hereafter "TEXCOM"). The letter was commenting on the Commission's Tentative Recommendation on *Disposition of Estate Without Administration: Liability* (July 2019) (hereafter "tentative recommendation").

TEXCOM has written again to comment on points raised in the memorandum. That new letter is attached as an Exhibit. The staff appreciates TEXCOM responding so quickly, so that the new information can be considered at the January meeting.

In the interests of expediting distribution of the new letter, this memorandum presents it without written analysis. The staff will share its analysis orally, at the upcoming meeting.

Respectfully submitted,

Brian Hebert
Executive Director

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

TRUSTS AND ESTATES



CALAWYERS.ORG/TRUSTS

January 24, 2020

VIA E-MAIL AND U.S. MAIL

California Law Revision Commission
Attn: Mr. Brian Hebert
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, California 95616
E-mail: bhebert@clrc.ca.gov

Re: Tentative Recommendation – Disposition of Estate Without Administration (Study L-4130.3) / Staff Memorandum 2020-4

Dear Commissioners:

This letter contains comments on behalf of the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (“TEXCOM”) in response to CLRC Staff Memorandum 2020-4 (“MM 2020-4”). MM 2020-4 considers TEXCOM’s comments regarding the Commission’s July 2019 tentative recommendation proposing revisions to the so-called “property return provisions” under Probate Code Sections 13100 et seq., applicable to personal property, and 13200 et seq., applicable to real property (the “13100 and 13200 procedures,” respectively).¹

TEXCOM identified three discreet issues in MM 2020-4 for which a TEXCOM response was requested or appropriate. These issues are highlighted below (in **bold**), followed by TEXCOM’s response on each issue.

- 1. A transferee’s distributee/restitution liability under the 13100 and 13200 procedures is limited to the value of the property received, but at what date should that value be determined? Date of death, date of receipt, date of restitution, other?**

MM 2020-4 expressly requested TEXCOM guidance on how this issue is normally handled in probate. Preliminarily, we observe that this issue rarely, if ever, comes up in probate because

¹ Unless otherwise noted, all statutory references in this letter are the Probate Code, as amended by the Tentative Recommendation.

one of the purposes of probate is to achieve finality regarding claims against the decedent's estate. As such, by the time of distribution, all potential creditor's claims are typically either resolved or time barred. That being said, we note that there is a Probate Code section – 9392 – which provides for distributee liability for creditor's claims in certain limited circumstances.² Under those circumstances, a distributee of the estate may have personal liability for the claim, limited to the net fair market value of the property received *on the date of the order for distribution*. (Probate Code § 9392(b).) Subdivision (b) of Probate Code section 19402 contains an analogous provision for trust administrations (where the Trustee avails itself of the voluntary notice to creditors procedure under Probate Code section 19000 et seq.) which provides that distributee liability is limited to the net fair market value of the property received *on the of date of its distribution*.

2. Should distributee liability for unsecured debts of the decedent include expenses of administration and family allowance?

TEXCOM's October 2019 letter took the position that, if a probate estate is opened after property is transferred under the 13100 or 13200 procedure, the transferred property should be treated the same as other property included in the decedent's probate estate; thus, it should be available to satisfy (i) creditor's claims, (ii) last illness and funeral expenses and (iii) general expenses of administration (subject to applicable abatement rules, if any). MM 2020-4 disagrees that the transferred property should be subject to administration expenses and – analogizing family allowance claims to administration expenses – family allowance claims as well. MM 2020-4 reasons, in part, that “the transferred property would not be administered and therefore would not contribute to or benefit from the expense of administration.”

TEXCOM understands and appreciates CLRC Staff's rationale for this position. Nevertheless, we disagree that property transferred under the 13100 or 13200 procedure should be exempt from publication fees, statutory fees and other expenses of administration (as well as family allowance). First, as one of the benefits of probate administration is finality of claims against the decedent's estate, the transferred property benefits from administration just the same as property included in the decedent's probate estate. Second, there are potential situations where MM 2020-4's position on this issue could be problematic. For example, if property transferred under the 13100 or 13200 procedure is exempt from expenses of administration, it could encourage heirs/beneficiaries of the decedent to rush to claim property under 13100 or 13200 in hopes of avoiding a pro rata share of administration expenses. Additionally, what if the property transferred under the 13100 or 13200 procedure represents the entirety of the decedent's estate? In that case, if a probate is subsequently opened for the decedent's estate (e.g., by a hitherto unknown creditor), under MM 2020-4's position, there would be no funds available to pay administration expenses.³

² Namely (a) the creditor was known or reasonably ascertainable, (b) no notice was given to the creditor and the creditor did not have actual knowledge of the probate, and (c) the claim is not time barred under the one-year limitations period under Code of Civil Procedure section 366.2.

³ At the risk of further complicating a fairly complicated statutory framework, if property transferred under the 13100 or 13200 procedure is to be subject to a pro rata share of administration expenses, the next logical question is whether the value of that property should be included in the fee base for calculating statutory fees payable to the

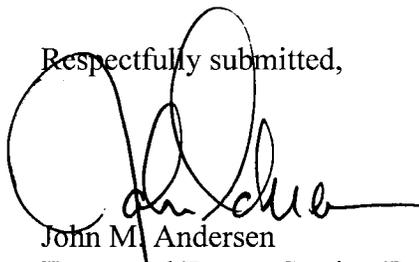
3. Where the decedent's estate brings a claim for restitution on behalf of a person with a claim of superior right against a transferee who fraudulently employs the 13100 or 13200 procedure, to whom should treble damages, if any, be awarded, the estate or the person with the claim of superior right?

TEXCOM's October 2019 letter noted, as a general matter, that treble damages should benefit the party injured by the fraud. While TEXCOM's letter contemplated situations where the injured party brings a claim for restitution directly, the same general rule should apply where the decedent's estate brings a restitution claim on the injured party's behalf. How this plays out in practice, however, may vary depending on the circumstances. For example, suppose the decedent's sole intestate heir claims property under the 13100 or 13200 procedure knowing that the decedent left a will leaving their entire estate to a specific charity. If the estate sues for restitution and treble damages are paid to the estate, those damages will flow through to the charity upon final distribution (net of administration expenses), which would be the appropriate result. Let's say, instead, that the decedent's will made a specific gift of the transferred property to the charity, with the residue of the estate going to the decedent's sole heir. If the estate recovers treble damages from the heir, it would obviously not make sense for those damages to pass with the residue of the decedent's estate. Rather, they should be paid to the charity along with the specifically gifted asset (or proceeds from the sale thereof).⁴

Conclusion.

As always, TEXCOM appreciates the opportunity to comment on the Commission's work affecting trusts and estate law and practice.

Respectfully submitted,



John M. Andersen
Trusts and Estates Section Executive
Committee California Lawyers Association

cc: Saul D. Bercovitch (via email to saul.bercovitch@calawyers.org)
Mark A. Poochigian (via email to mpoochigian@bakermanock.com)
Ellen McKissock (via email to emckissock@hopkinscarley.com)

2096990

personal representative and the personal representative's attorney. This might suggest modifications to subdivision (b) of Probate Code sections 10800 and 10810, respectively.

⁴ Query whether the expenses of the restitution action itself should be charged against the charity's share, especially if the residue of the estate passes to an innocent third party.